

FILED  
ORIGINAL  
APR 25 1995

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

OMAR STRATMAN, TONI BURTON,  
JOHN MURRAY, and MICHAEL  
DEVERS,

Plaintiffs,

vs.

BRUCE BABBITT, Secretary of  
the Interior; ANTON LARSEN,  
INC.; LEISNOI, INC.; and  
KONIAG, INC., Regional Native  
Corporation,

Defendants.

Case No. A76-0132-CV (JAV)

Anchorage, Alaska  
Friday, April 14, 1995  
9:32 o'clock a.m.

ORAL ARGUMENT ON PLAINTIFF  
STRATMAN'S MOTION FOR PRE-  
LIMINARY INJUNCTION

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES A. VON DER HEYDT  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

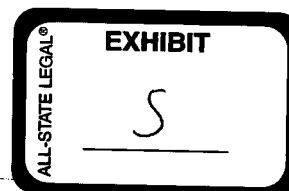
For the Plaintiff:  
Omar Stratman

MICHAEL J. SCHNEIDER, ESQ.  
Law Offices of Michael Schneider  
880 N Street, Suite 202  
Anchorage, Alaska 99501  
(907) 277-9306

ERIC R. COSSMAN, ESQ.  
Law Offices of Michael Schneider  
880 N Street, Suite 202  
Anchorage, Alaska 99501  
(907) 277-9306

For the Plaintiff:  
Toni Burton

ALAN L. SCHMITT, ESQ.  
Jamin, Ebell, Bolger & Gentry  
323 Carolyn Street  
Kodiak, Alaska 99615  
(907) 486-6024



1 APPEARANCES (continued):

2 For the Defendant:  
3 Leisnoi, Inc.

EDGAR PAUL BOYKO, ESQ.  
Edgar Paul Boyko & Associates  
711 H Street, Suite 510  
Anchorage, Alaska 99501  
(907) 279-1000

5 JOHN R. FITZGERALD, ESQ.  
6 Edgar Paul Boyko & Associates  
711 H Street, Suite 510  
7 Anchorage, Alaska 99501  
(907) 279-1000

8 For the Defendant:  
9 Koniag, Inc.

R. COLLIN MIDDLETON, ESQ.  
Middleton, Timme & Luke  
550 West 5th Avenue, Suite 1600  
10 Anchorage, Alaska 99501  
(907) 276-3390

11 For the Defendant:  
12 United States

BRUCE M. LANDON, ESQ.  
Department of Justice  
801 B Street, Suite 504  
13 Anchorage, Alaska 99501-3657  
(907) 271-5452

14 Court Recorder:

NATALIE DAY  
U.S. District Court  
222 West 7th Avenue, #4  
15 Anchorage, Alaska 99513  
(907) 271-3259

17 Transcription Service:

SECRETARIAL ASSISTANCE SERVICE  
7033 Henderson Loop  
18 Anchorage, Alaska 99507  
(907) 349-5259

19  
20 Proceedings recorded by electronic sound recording. Tran-  
script produced by transcription service.  
21  
22  
23  
24  
25

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 ANCHORAGE, ALASKA -- FRIDAY, APRIL 14, 1995  
2 (On record -- 9:32 o'clock a.m.)

3 THE CLERK: -- James von der Heydt presiding.  
4 Please be seated.

5 THE COURT: Good morning. We've set this time to  
6 hear arguments of counsel upon plaintiff's motion for a pre-  
7 liminary injunction in civil cause A76-132 -- it's almost as  
8 old as I am -- Stratman versus Babbitt. I know that, Mr.  
9 Schneider, you wish to be heard and Mr. Boyko. Who else  
10 wishes to be heard?

11 MR. BOYKO: If it pleases the Court, I have with me  
12 Mr. John Fitzgerald, ~~my associate who did the laboring more~~  
13 on our brief, and I would ask the Court's permission that he  
14 be allowed to handle the response argument, saving me some-  
15 where between five or seven minutes to address the public  
16 interest issue only.

17 THE COURT: Well, I -- you may divide your time as  
18 you wish. The plaintiff -- the moving party has the right --

19 MR. BOYKO: Yes.

20 THE COURT: -- to open and close the argument.

21 MR. BOYKO: Yes, I understand that. What I was  
22 hoping is that Mr. Fitzgerald would address the Court in  
23 response for about twenty-three to twenty-five minutes and  
24 then leave me five to seven minutes to wind up.

25 THE COURT: All right. I'll trust Mr. Fitzgerald

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

has a watch. Okay.

MR. BOYKO: I'll be his timekeeper.

THE COURT: Okay, fine. It's your motion, I'll hear you first, Mr. Schneider.

MR. SCHNEIDER: Thank you, Your Honor. Before --

THE COURT: May I say this? I'm familiar with the briefs, so I urge you not just to repeat all that, but I do want to hear what you have to say, and I urge you to keep track of your time.

MR. SCHNEIDER: Very well, sir.

THE COURT: All right.

MR. SCHNEIDER: My only housekeeping question before we begin, Your Honor, is am I to address the issues in the motion to dismiss this morning as well, or simply the preliminary injunction matter?

THE COURT: Well, primarily I'm interested in the preliminary injunction. If you want to just spend a few minutes on the other, I'd hear you.

MR. SCHNEIDER: Then I'm -- I'm ready if Your Honor is.

THE COURT: Yes.

**PLAINTIFF STRATMAN'S ARGUMENT**

MR. SCHNEIDER: Okay. On the motion to dismiss -- to dismiss -- very briefly, Your Honor -- the Burtons have objected. I'm not sure what it is they want. If what they

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 really want is continuing copies of the pleadings, I think  
2 the -- the answer here is dismiss them from the case, tell us  
3 all to give them courtesy copies, that solves that problem.  
4 The Burtons have settled with Leisnoi, they cannot proceed  
5 with a claim against Leisnoi, they didn't join in the request  
6 to reopen, and they ought to be out.

7 As to Koniag, Koniag ought to be out, they've set-  
8 tled with us, their Rule 19 status as a partner is history,  
9 they claim in the most -- in my favorite affidavit in this  
10 entire pile -- that one of the major purposes of the 1990  
11 agreement was to prevent the reopening of this very case.

12 ~~They claim that they knew this case was going to be reopened,~~  
13 that they thought that they would be successful and that the  
14 State Supreme Court saw it would go on, yet in this agree-  
15 ment, claims against Leisnoi are not mentioned anywhere,  
16 nowhere, not at all. We have settled with them. Once again  
17 -- consistently, I might add -- they want the benefit of the  
18 settlement without paying the burdens of the settlement  
19 agreement; they ought to be out of here. These parties are  
20 entitled to be (indiscernible) to each other and they should  
21 be out of the case and off the caption.

22 With that, allow me to go on, if I can, to our --  
23 to the issues in the injunction matter that we brought.  
24 Allow me to repeat, I guess, the standard just very briefly,  
25 and I'll try to key my -- my comments off of that.

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 We got a couple of tests, the traditional test and  
2 the alternative test, Your Honor's familiar with them. Under  
3 the traditional test, we have to show irreparable injury --  
4 I'm not going to spend any time on irreparable injury except  
5 to say how do you not get irreparable injury when you're  
6 cutting down a forest that's two hundred to four hundred  
7 years old? How do you not get irreparable injury? How do  
8 you not get irreparable injury when the party doing the cut-  
9 ting is insolvent? Your Honor will note that in our brief,  
10 we cite a bunch of stuff about if you're insolvent, that  
11 simply can be grounds for showing irreparable harm. No one  
12 has come back -- there is nothing in the record suggesting  
13 other than what we have asserted; to wit, that they are cut-  
14 ting down the only assets they have. It's like -- it's like  
15 letting a bank robber spend all the loot while he's out on  
16 bail pending trial. I mean, if -- if we've got anything in  
17 this case, we've got irreparable injury.

18 The -- we have to show probabail -- under the tradi-  
19 tional test, we have to show probability of success on the  
20 merits. I think we've got that in spades, and I will address  
21 that in more detail in just a minute or two. In balancing  
22 the equities, there has to be -- you have to look at the harm  
23 to Leisnoi versus the harm to the public, and here the harm  
24 to Leisnoi is they can plunder later, but they can't plunder  
25 today if they're so fortunate as to win this case. But if

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 penalized because he's the only citizen with the stubbornness  
2 and the guts to hang in there this long. He's been abandoned  
3 by the rest of the citizens, but he's still in there. If  
4 anything, he should be applauded for his courage and his  
5 tenacity and not castigated for it. There is no -- and we're  
6 not happy with our role here. We wish we had a few indi-  
7 vidual claims. We'd like to prosecute them. We don't have  
8 any. That just -- that's the spot we're in. So I would sug-  
9 gest to Your Honor that under the traditional test, we're  
10 home free.

11 Let's take a look at the alternative test, the test  
12 that is most typically discussed by the Ninth Circuit and  
13 most typically employed there. We have to show one or the  
14 other, not both. Number one, "probable success on the merits  
15 and possible irreparable harm." Well, again, we've got the  
16 success on the merits, we got all kinds of irreparable harm.

17 Let's go to the second prong or the second ap-  
18 proach:

19 "Sufficiently serious questions going to the merits to  
20 make them a fair ground for litigation,"  
21 and, Your Honor, I'd suggest that's legalese for horse race,  
22 and not any kind of horse race. Two horses, four legs  
23 apiece, that's it. If we have a prima facie case under the  
24 second prong here, we're in there; that's all we need, that's  
25 what the cases say. We -- and -- and again, I'll address

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259



1 this in a moment -- we are in much better shape than that.

2 And -- so we need, you know, two live horses and

3 "a balance of hardships tipping decidedly toward  
4 the party requesting preliminary relief."

5 Well, we're the party requesting it, but quite obviously  
6 we're not requesting it in our own name. And once again, how  
7 is it that if this injunction issues, Leisnoi is harmed?

8 They can lop these trees down at the end of this case. On  
9 the other hand, if they're -- if -- if the trees are cut, if  
10 the money's spent, then there will be no basis -- no possi-  
11 bility of recovery for the United States of America, for any  
12 ~~entitled Native village, or anyone else who be -- falls heir~~  
13 to these properties.

14 Now I'm going to use up a few more minutes of my  
15 time and I'm going to try to reserve a good bit of time, but  
16 I'm going to use up a few more minutes of my time focusing  
17 specifically on the merits part of the case because I think  
18 it is the most right -- it may be the most interesting part  
19 of the case, and there are some things about the merits argu-  
20 ments and the facts in the record that I hope to be able to  
21 specifically draw to Your Honor's attention.

22 First of all, as Your Honor reads through these  
23 affidavits, I'm sure the Court's wondering why don't these  
24 people tell me where -- this is Woody Island, Judge -- where  
25 on Woody Island this village is? Why in all this -- you

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259



they tell me where this village is? Well, I'll tell you why they don't tell you where this village is because they're between a rock and a hard place under the law and the regulations. If they say, hey, this village is right here, then they're in the deep weeds because although there's probably a few Native people there, there are nowhere close to twenty-five, they'll never be able to get close to twenty-five; they just can't come anywhere close. If they say -- this is the mission area down here -- if they say, hey, the village is here, then people are going to say you've got to be joking, this is the FAA facility and while you'll get over twenty-five, you will never get a majority of Natives.

So only if they use this fuzzy description, this village -- only if they talk about the whole island can they keep this phoney ball in the air at all. Otherwise, they're dead in the water right out of the shoot; they just can't get there.

And I think that here, Your Honor, note that in ANCSA law, you don't go down the Yukon River and every time you can draw a circle around twenty-five Native -- Native inhabitants, say, hey, that's a village; you don't do that. You've got to have a village. When they come and put their finger on the map and say the village is here, then, of course, the photographic evidence kills them. They are just

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

2                   ... in the water on their merits argument.

3                   This is not -- we have some affidavits about large  
4 families. I mean, it's almost as if Leisnoi is asserting  
5 that this is a pre-Newt Gingrich, anti-family planning act  
6 that under ANCSA if you have mom and dad and twenty-three  
7 Native children, you get the -- you can be called a village.  
8 I -- you know, that's a -- that would be an interesting con-  
9 clusion of law to reach. I don't think that's a conclusion  
10 law this Court is going to reach.

11                   I think if we look at some of the merits affida-  
12 vits, the one that I found most impressive and most inter-  
13 esting was the merits affidavit submitted by Judge Madsen --  
14 Judge Madsen. Good judge, good lawyer, been in Kodiak since  
15 Captain Cook turned around in the inlet. He has access poli-  
16 tically, socially, culturally to the people who claim to have  
17 supposedly occupied an established village in 1971 on this  
18 island.

19                   Now Judge Madsen knows about affidavits, he knows  
20 about regulations and statutes, he understands that there has  
21 to be a harmony between these requirements and the facts to  
22 get what you want, and if you can't generate that harmony,  
23 you lose your case. That's not lost on him, that's not lost  
24 on Your Honor.

25                   Judge Madsen, having spent a lifetime developing a  
reputation of candor and honor, and knowing what's at stake

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

here. Isn't going to agree. And he didn't in  
2 his affidavit. And what's he tell us? He submits eighteen  
3 names to Leisnoi to research -- eighteen; not twenty-five,  
4 eighteen.

5 Now I don't know if we got the results of the re-  
6 search in this pile of stuff or not, but as you look through  
7 these affidavits, what you see is evidence of a consistent  
8 historical use of the island, not a use of the established  
9 village, and what you see is no twenty-five people. I mean,  
10 I -- I get worried. I read those things, paragraph comes  
11 along, you see something about a whole bunch of people, and  
12 the next paragraph they say but I don't know when they left.  
13 Or there's folks there in seventy-five, but we don't know if  
14 they were there in seventy-one.

15 There's no evidence that the population -- the  
16 Native population of this island changed at all in response  
17 to the earthquake in the record; no credible evidence. In  
18 fact, the affidavits and the deposition of Ewell Chafin (ph)  
19 are quite consistent that there were very total -- if you  
20 look at the whole island, there are very few Native inhabit-  
21 ants of that island, certainly less than twenty-five, before  
22 the earthquake, after the earthquake, in seventy-one, or in  
23 sixty. The census data says -- well, I can't remember, it  
24 was either forty or forty-one people in sixty-one Native.  
25 They've got to have twenty-five and that's got to be a ma-

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

2 The biggest number in any of this pile of malarkey  
3 is this hand-transcribed, uncertified, uncross-examined,  
4 unverified newspaper clipping from the time of the earthquake  
5 when someone at the FAA place says, hey, big tidal wave,  
6 folks from the other end of the island show up, Natives,  
7 think there might -- you know, about twenty. And how would  
8 we like to base a finding of fact giving these people fifty-  
9 thousand-plus acres of Kodiak Island and other ANCSA benefits  
10 on that? And, of course, it's a smaller number than twenty-  
11 five.

12 The regulations, admittedly more lenient than Leis-  
13 noi argues so much in favor of, Your Honor, were, of course,  
14 knocked out; they were knocked out in the two cases we cite  
15 to the Court. District Court said, hey, these regs are in-  
16 valid, D.C. Court of Appeals said right on, they clearly --  
17 they -- they clearly broaden the possibilities that were  
18 intended under ANCSA and, of course, when you broaden the  
19 claims possibilities in a fixed pie, what do you do? You  
20 take away from those Congress specifically intended to bene-  
21 fit. And, you know, using very conventional legal reasoning,  
22 the court said no way, you're out of here.

23 I think it is interesting, Your Honor, that Leisnoi  
24 has known that this motion is on its way, this fight on the  
25 merits is coming for a long time, but certainly, certainly

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 since December of 1977. It is now the 14th of April.  
2 there isn't an affidavit in front of this Court that says  
3 there's an established village, it's here, there or anywhere  
4 there were twenty-five Native inhabitants, and they consti-  
5 tuted a majority of the population of that established vil-  
6 lage. It is not in the record.

7 If this was a motion for summary judgment, I would  
8 contend that Your Honor would have a tough time saying no to  
9 us on the record before it. If you look at their own sub-  
10 missions, the field report of which they profess such pride  
11 lists Leisnoi in a 1968 document as being, quote, abandoned.  
12 Why? 'Cause it was. It wasn't there.

13 If you look at the reason that Gail Fitzpatrick,  
14 investigating -- using the word in its broadest context --  
15 for the Department of Interior, certified this village. Had  
16 nothing to do with all this smoke about traditional use. He  
17 -- he believed the people that gave him affidavits that said  
18 there was an established village in a definable place and  
19 those people have recanted those affidavits and that recanta-  
20 tion is under oath.

21 They are dead meat on the merits. We have strong  
22 proof on the merits, we have strong evidence of irreparable  
23 injury, and under those circumstances I contend that the  
24 Court is -- should be compelled, we hope it is compelled, to  
25 grant our request for an injunction.

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

2 I believe, Your Honor, that I have an additional  
3 fifteen minutes?

4 THE COURT: That's about right.

5 MR. SCHNEIDER: And unless Your Honor has ques-  
6 tions, I'll be seated.

7 THE COURT: Do you wish to address the question of  
8 security --

9 MR. SCHNEIDER: Yes.

10 THE COURT: -- Rule 65(c)?

11 MR. SCHNEIDER: I do. We don't have, in this pile  
12 of stuff in front of Your Honor, one affidavit, one anything  
13 explaining to the Court what Leisnoi's losses will be --  
14 nothing, zero, it isn't there. We don't have so much as  
15 something from a logger saying I just can't feed Martha if  
16 they stop the saws. We don't have that. We don't have any  
17 indication that Leisnoi will lose a nickel in the record, not  
18 there. We have some smoke and some argument -- and by the  
19 way, Your Honor, if -- if it is not clear from our pleadings,  
20 we object, naturally, to every uncertified, unverified, un --  
21 facially unacceptable piece of stuff that's been attempted to  
22 be submitted for the record in this fight. It is just not  
23 there.

24 Mr. -- if Mr. Stratman had individual claims, then  
25 I think we've got a -- you know, we're in a tough spot here,  
just like we'd be in a tough spot if the trigger date in

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259



2 ANCSA was 1930, you know? We -- but it's not 1930 and he  
3 doesn't have individual claims. He is standing here as a  
4 member of the public asserting public claims, public inter-  
5 est, and in those settings, there should not be a bond re-  
6 quirement.

7 There's -- there's no case just like this out  
8 there, Judge. We haven't found one supporting our position  
9 and they haven't found one against us 'cause this is the only  
10 one there is. But what's the analogy here? Mr. Stratman  
11 doesn't have individual claims. He's submitting public  
12 rights as an -- anticipated by various -- by -- within ANCSA  
13 and in other statutes we have not yet pursued yet, like the  
14 Federal False Claims Act. In either instance, no bond should  
15 be required, this Court has no record upon which it could  
16 quantify a bond. The -- the security requirement says:

17 "For payment of such costs and damages as may be  
18 incurred or suffered by any party."

19 Okay. Where's the record on that? It isn't here. So based  
20 on no record, there should be no bond. Based on Mr. Strat-  
21 man's unfortunate unwilling status as a public interest liti-  
22 gant, there should be only a nominal bond. He can't post  
23 anything other than a nominal bond.

24 Does the Court have other questions?

25 THE COURT: Thank you.

MR. SCHNEIDER: Thank you.

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259



17  
THE COURT: Mr. Boyko -- or Mr. Fitzgerald? Excuse  
me.

(Pause)

DEFENDANT LEISNOI, INC.'S ARGUMENT

MR. FITZGERALD: May it please the Court. Most of the analysis that was in our opposition to the motion for preliminary injunction still has not been addressed by Mr. Stratman. I notice that he stated that he didn't have time to brief the issue because he had asked that this briefing schedule be accelerated. I guess sometimes you have to be careful what you ask for because it may be granted. Having succeeded in obtaining --

THE COURT: Well, I don't know that it was much he -- much accelerated, counsel. I believe by the time everything got in so I could rule on it, it -- the normal times were pretty well -- had pretty well gone by, but --

MR. FITZGERALD: We -- we had expected that he would have addressed our arguments at oral argument. I think that's what he had indicated in his brief. But most of -- most of the arguments have gone unrebutted at this point. We don't have a problem with his statement of the governing standards for preliminary injunction. It's how he attempts to apply them to this case we're -- he's in error.

Turning first to the balance of harm analysis. One of the elements for a preliminary injunc -- injunction, of

Secretarial Assistance Service

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 course, is that the defendant must not be harmed more than  
2 the plaintiff is helped by the injunction. The William  
3 Engels and Sons Baking case from the Ninth Circuit stands for  
4 that proposition. None of the cases cited by Stratman in-  
5 volved a recreational user trying to stop a private landowner  
6 from using the fruits of his land.

7 At page twenty-four of his brief, Stratman argues,  
8 and I quote:

9 "The overriding public interest in preserving gov-  
10 ernmental control of public lands well outweighs  
11 any harm that Leisnoi will suffer from the issuance  
12 of the injunction."

13 The flaw in Mr. Stratman's balancing test is that these are  
14 not public lands. The United States Supreme Court in the  
15 Northern Lumber Company versus O'Brien case, 204 U.S. 190,  
16 defined the term public lands as being lands open to sale or  
17 other disposition under general laws which specifically do  
18 not include lands, quote "to which any claims or rights of  
19 others have attached," close quote.

20 Here, the land has been conveyed by the government  
21 to Leisnoi, Inc., so rights of others have attached -- the  
22 rights of Leisnoi to this land has attached. Therefore,  
23 these are not public lands. Therefore the cases cited by  
24 Stratman in his brief in the connection of the balance of  
25 harm analysis are all unpersuasive. I refer now to the Down-

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 state Stone Company, Bales versus Roosche (ph), U.S. versus  
2 Barrows, Sierra Club versus U.S. Forest Service. None of  
3 those cases apply, they all dealt with public lands; these  
4 are not public lands.

5 On his public interest analysis, again, this error  
6 permeates his brief. For example, in his analysis of whether  
7 the public interest would be advanced or impaired by the  
8 issuance of an injunction, he states as follows:

9 "The primary interest at stake here is the public  
10 interest in maintaining governmental management and  
11 control of public lands during the pendency of  
12 ~~actions involving their rights.~~"

13 Here again, Stratman erroneously refers to Leisnoi's property  
14 as being public lands, although the Supreme Court defines  
15 that term as excluding lands to which rights of others have  
16 attached. So again, in this section of his brief, the cases  
17 cited by Stratman dealing with his public interest analysis  
18 are not applicable.

19 In assessing the public interest, this Court should  
20 focus upon the need for stability and repose under ANCSA.  
21 This has been legislatively recognized by Congress. ANCSA is  
22 in the public interest because it resolves land claims that  
23 had clouded title throughout Alaska. In the event that  
24 Stratman were successful in his relief, the government would  
25 have to convey another hundred and fifteen thousand acres out

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

2 ANCSA. So Stratman's not in the public interest, he's suing  
3 the government, and the result of his suit would be that the  
4 government would have to take additional lands that could now  
5 be used by berry pickers, wildlife photographers, and turn  
6 them over to a corporation which has to act in the interest  
7 of its shareholders.

8 Turning to the flaws in Mr. Stratman's irreparable  
9 injury analysis. Stratman claims at page twelve of his brief  
10 that, quote:

11 "The risk that the government may be unable to  
12 collect a judgment from Leisnoi for damages caused  
13 by its timber cutting constitutes irreparable in-  
14 jury."

15 The problem with this theory, of course, is that the govern-  
16 ment has already stated, quote: "No monetary damages are  
17 available to the United States," citing 28 U.S.C., Section  
18 2415, subsection (b), which is a three-year statute of li-  
19 mitations from tort or fraud claims, and the government has  
20 further stated in this case, quote:

21 "The United States could not annul the conveyances  
22 already made,"

23 close quote, citing 43 U.S.C., Section 1166, which has a six-  
24 year statute of limitations on suits to annul patents issued  
25 by the United States.

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 This suit brought by Stratman does not seek mone-  
2 tary damages, nor has a claim for prejudgment attachment been  
3 filed. Indeed, the com -- complaint does not seek to enjoin  
4 logging. The pending motion is outside the scope of the  
5 pleadings and we decline voluntarily to litigate the issue.  
6 There is nothing in the complaint that seeks the relief  
7 sought here today, this is well outside of the scope of the  
8 complaint in terms of the remedy sought, it is also outside  
9 the scope of the complaint because Stratman himself conceded  
10 that the only lands at issue in this Stratman One case are  
11 the lands to which he once held a BLM grazing lease. All the  
12 ~~other land was at issue in Stratman Two, which Your honor~~  
13 already dismissed, and Mr. Stratman failed to take an appeal  
14 from that dismissal.

15 His claim that the harm is that the government  
16 would be unable to collect a judgment from Leisnoi for dam-  
17 ages caused by its timber cutting reveals that, in essence,  
18 what we have here today is not a motion for preliminary in-  
19 junction, but rather a motion for a prejudgment writ of at-  
20 tachment; that's the -- that's the real relief sought here.  
21 And accordingly, this Court should analyze this under Rule 64  
22 and not under under Rule 65.

23 The leading case on this point is the 1994 decision  
24 from the Eleventh Circuit, 14 Fed. Third 1507, Mitsubishi  
25 International versus Cardinal Textile Sales. They state:

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 "It is plain that attachment is the relief sought  
2 by the plaintiff notwithstanding its labeling as a  
3 preliminary injunction."

4 And the court goes on to hold that:

5 "The standards of Rule 64 rather than Rule 65  
6 therefore govern the analysis."

7 Of course, under Federal Rule of Civil Procedure  
8 64, it directs this Court to look to applicable state law and  
9 that, of course, is Alaska Rule of Civil Procedure 89, which  
10 states quite plainly that:

11 "A writ of prejudgment attachment is only available  
12 in cases on a contract for a sum certain then due."

13 This is not a claim for a breach of contract between Leisnoi  
14 and Stratman. The relief sought is a prejudgment attachment,  
15 it's merely labeled as a preliminary injunction. This Court  
16 should focus on Rule 64, not Rule 65, and he's not entitled  
17 to the re -- that relief under the standards of Rule 64.

18 On the bond requirement. Stratman is trying to  
19 shut down a village Native corporation. He's trying to  
20 strangle it so as to con -- coerce this village Native cor-  
21 poration into paying him money and giving him land. His  
22 newspaper article, which has been authenticated in the affi-  
23 davit that we filed yesterday, makes it quite explicit; what  
24 Stratman really wants is land and he wants cash, he wants to  
25 line his pockets, he is not a public interest litigant.

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259



1 Public interest litigants don't hire attorneys on a contin-  
2 gency fee. It's quite apparent from the history of this case  
3 what it is that Stratman wants. He sued to enforce a settle-  
4 ment agreement that Leisnoi never entered into; took that all  
5 the way up to the Alaska Supreme Court where he lost. His  
6 arguments that he should be excused from posting a bond are  
7 frivolous.

8 The primary case he relies upon, of course, is the  
9 People versus Tahoe Regional Planning Agency, Ninth Circuit,  
10 1985, for the proposition that his bond should be nominal-  
11 ized. No bond was required in that case because the inter-  
12 state compact at issue therein stated that a state need not  
13 post a bond to enforce the compact. Next, Stratman cites to  
14 People, Ex Rel, Vandekamp (ph) versus Tahoe Regional Plan, a  
15 ninth -- another Ninth Circuit, 1985 case, for the proposi-  
16 tion that his bond should be nominalized.

17 Again, we're dealing with statutes not applicable  
18 here. The NEPA statute has a private enforcement mechanism,  
19 and the Ninth Circuit has stated that:

20 "Special precautions to ensure access to the courts  
21 must be taken where Congress has provided for pri-  
22 vate enforcement of a statute."

23 Totally different purpose to NEPA as there is to ANCSA.

24 Friends of Earth versus Brinager (ph) was another NEPA case  
25 that he cites and so was City of Tenaki Springs versus Clow

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259



1 (ph). So these cases on the bond requirement are not appli- 24  
2 cable. Mr. Boyko is going to address the bond issue further  
3 in his comments.

4 Stratman sat on his rights by not seeking a prelim-  
5 inary injunction for nineteen years. Equity holds that a  
6 person that sits on his rights is not entitled to equitable  
7 relief. I already mentioned, this relief is not even pled in  
8 the complaint. I don't know why he has the right to seek  
9 this relief. It's well outside the scope of Rule 8. We  
10 cited the Court to the Conley versus Gibson case. He can't  
11 do what he has attempted to do here.

12 Moreover, in his oral arguments, Mr. Schneider just  
13 mentioned that he's planning on amending to add a key town  
14 (ph) claim. He said it's not yet been done -- not yet --  
15 indicating he intends to do it. He intends to amend to seek  
16 monetary damages. Obviously, there is no equitable relief  
17 available to a party that claims to have a remedy at law. He  
18 didn't respond to any of these arguments that we've briefed.

19 A third principle of equitable relief is that one  
20 who has unclean hands is not entitled to equitable relief.  
21 Here, Omar Stratman has lied repeatedly throughout this liti-  
22 gation and throughout the litigation in the Stratman Two case  
23 as well. His -- his initial complaint in this case stated  
24 that he owns a BLM grazing lease, which is false and fraud-  
25 ulent and misleading. He sold that years ago. He sold that

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 In 1976 before he ever brought this suit. He does not own a  
2 BLM grazing lease. He amended his complaint in 1977 to de-  
3 lete allegations of fraud. In the amended complaint, he  
4 repeated his lie. He again stated that he is the holder of a  
5 BLM grazing lease, which obviously influenced the Court of  
6 Appeals of the Ninth Circuit, which stated in its ruling that  
7 he was the holder of a BLM grazing lease at the time suit was  
8 filed and, therefore, they put him into a separate category.

9 And in preparing for oral arguments, I notice that  
10 Stratman repeated this lie also before the Alaska Native  
11 Claims Appeal Board. Before them he also stated that he  
12 owned this lease. So Stratman has terribly unclean hands  
13 here. He's not entitled to any equitable relief.

14 The relief sought herein is barred. Stratman al-  
15 ready had a full and fair administrative hearing before the  
16 Alaska Native Claims Appeal Board. They entered its decision  
17 adverse to Mr. Stratman, and what did he do based upon that  
18 adverse decision? Absolutely nothing. Didn't bother taking  
19 an appeal from it. The Ninth Circuit Court of Appeals re-  
20 manded this decision -- its deci -- this case, excuse me, to  
21 Your Honor for a determination of whether or not this Court  
22 should excuse Stratman from having failed to exhaust his  
23 administrative remedies.

24 I submit to the Court that it should find that  
25 Stratman not be excused from that requirement. Obviously,

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 the fact that Stratman pursued his administrative remedies in  
2 1977, after the filing of this 1976 case, shows that he  
3 failed to exhaust his administrative remedies before filing  
4 the case. The 1979 litigation, Stratman Two, that was filed  
5 after the ANCAB, ruled against Omar Stratman. In that case,  
6 he could have appealed from the ANCAB decision, but he didn't  
7 bother doing that, just like he didn't bother appealing from  
8 Your Honor's dismissal with prejudice of the Stratman Two  
9 case.

10 Res judicata bars the instant action. We have a  
11 final judgment, we are entitled to rely on that final judg-  
12 ment. He cannot continue to harass this Native village cor-  
13 poration with perpetual litigation. There must be an end to  
14 all litigation, and the end came when Your Honor issued a  
15 final judgment and he failed to appeal from it.

16 Yesterday we supplied the Court with numerous U.S.  
17 Supreme Court citations for the proposition that it doesn't  
18 matter which case was filed first, a final judgment can pre-  
19 clude litigation of a suit that was already pending at the  
20 time that the second suit was filed. The --

21 THE COURT: Just a minute. Say that again.

22 MR. FITZGERALD: A final judgment in suit number  
23 two can bar proceedings in suit number one because suit num-  
24 ber one has not yet gone to a final judgment. So we are  
25 entitled to assert the doctrine of res judicata to preclude

1 the instant 1976 suit because we have a final judgment.

2 We supplied the Court with several citations to  
3 this effect. Irrespec -- this is U.S. Supreme Court, Chicago  
4 Rock Island:

5 "Irrespective of which action or proceeding was  
6 first brought, it is the first final judgment ren-  
7 dered which becomes conclusive in the other as to  
8 res judicata."

9 We sup -- we've cited a -- a number of cases:

10 "Although it is rendered after the initiation of  
11 proceedings in which the bar is then asserted, res  
12 judicata still applies."

13 It is familial law that goes back many years in front of the  
14 U.S. Supreme Court.

15 An interesting U.S. Supreme Court case that I would  
16 urge Your Honor to review is the Butler versus Eaton case,  
17 and that -- that was cited within the Reid versus Allen case  
18 that we provided to the Court. In the Butler versus Eaton  
19 case, there was one judgment rendered and based upon that  
20 judgment, a second decision followed it. The first judgment  
21 was appealed and reversed; the second judgment was also ap-  
22 pealed. Based upon the reversal of the first judgment, the  
23 Supreme Court was able then to reverse the second judgment.

24 In the Reid versus Allen case, the party failed to  
25 appeal from the second judgment. The court said he really

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

1 should have done the procedure that we set forth in the But-  
2 ler versus Eaton case, he should have appealed the second  
3 judgment so as to prevent the doctrine of res judicata from  
4 kicking in. But when you fail to appeal from a final judg-  
5 ment, it is res judicata.

6 So the mere act of taking an appeal in the 1976  
7 case does not get Stratman out of the woods here from his  
8 failure to appeal from the 1979 case:

9 "Where a judgment in one case has successfully been  
10 made the basis for a judgment in a second case, the  
11 second judgment will stand as res judicata although  
12 the first judgment may be subsequently reversed."

13 That's the holding of the U.S. Supreme Court, that's a quote  
14 from the Reid versus Allen case, 236 U.S. 191.

15 Stratman leaves these corpses lying around. He  
16 didn't bother appealing from the Alaska Native Claims Appeal  
17 Board case, he didn't bother appealing from Your Honor's  
18 decision in Stratman Two. Doctrine of res judicata precludes  
19 him from seeking relief here.

20 Finally, Your Honor -- I see I'm starting to run  
21 out of time -- the Koniag versus Cleppe (ph) case did not  
22 address the portion of the CFR -- 43 C.F.R. 2651.2(b), which  
23 contains the important -- provided that we're excused from  
24 meeting other requirements of the statute if we can show that  
25 the village was temporarily unoccupied by virtue of an act of

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259

ten years. The court specifically confined its holding to listed villages. Woody Island, of course, was an unlisted village and was not affected by the ruling. What the court in the Koniag versus Cleppe (ph) decision held is that the Secretary cannot impose additional hurdles that the parties -- the villages would have to comply with other than were set out in the statute. They cannot make it more difficult than Congress envisioned by adding a number of additional requirements.

They didn't say anything about unlisted villages -- the regs do not impose any additional requirements on unlisted villages. The court's holding was specifically limited to that and the statement -- he's trying to broaden the holding by saying they threw out all the regs. Well, that's simply not the case. If Your Honor wants to take a look at the ru -- the rulings in that case, you'll see it's quite apparent.

The -- at page six of his reply, Stratman claims that, quote:

"There were never twenty-five Natives on Woody Island during the period immediately preceding the sixty-four quake."

No citations were given for that bald assertion of fact.

Here's the field report, Your Honor. This is -- this is what

2 two forty-eight, it contains the official census data for  
3 Woody Island, and it states that the figures represent Na-  
4 tives primarily. Hundred and eleven in 1950, seventy-eight  
5 in 1960. Stratman claims that there was only one or two left  
6 by 1970, so that means, if he were correct, that seventy-six  
7 people left between 1960 and 1970. So obviously, something  
8 happened between 1960 and 1970, and we all know what that  
9 was, it was the 1964 earthquake and the tidal wave that wiped  
10 out Woody Island. We submitted the affidavits indicating  
11 just how important it was that that FAA ferry service pro-  
12 vided a means of transportation to and from the island. When  
13 they shut down the FAA, they ceased the FAA ferry, and they  
14 shut down the schools. We have the tremendous damage in-  
15 flicted by the quake.

16 So we complied with the regulations. Stratman has  
17 long since missed the statute of limitations to seek to nul-  
18 lify those regulations. It would have been a six-year stat-  
19 ute of limitations under 28 U.S.C., Section 2401, and again,  
20 there's no allegation in the complaint that he seeks to nul-  
21 lify an administrative regulation; this is the first time  
22 we're hearing of it.

23 Finally -- and again, this is something he didn't  
24 even bother mentioning in his brief, didn't address at oral  
25 arguments. Congress has statutorily ratified the certifica-

**Secretarial Assistance Service**

7033 Henderson Loop Anchorage, Alaska 99507  
Telephone/FAX (907) 349-5259